

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

AFFILIATED FM INSURANCE CO.,

CASE NO. C06-1750JLR

Plaintiff,

ORDER DENYING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

## LTK CONSULTING SERVICES, INC.,

Defendant.

## 1. INTRODUCTION

Before the court is Defendant LTK Consulting Services, Inc.’s (“LTK”) motion for summary judgment (Dkt. # 172). Two of the arguments LTK raises in its present motion are variations of arguments that LTK has previously raised, including that (1) the factual allegations in that Plaintiff Affiliated FM Insurance Co.’s (“AFM”) complaint are false, and (2) AFM’s claims are barred by the statue of limitations,. (Compare Mot. (Dkt. # 172) with 5/1/12 Mot. (Dkt. # 80).) The remaining arguments LTK raises on summary

1 judgment are that AFM failed to mitigate its damages and assumed the risk at issue.  
 2 (Mot. at 21-24.) The court has reviewed LTK's motion, all submissions filed in support  
 3 of and opposition thereto, the balance of the record, and the applicable law.<sup>1</sup> Being fully  
 4 advised, the court DENIES LTK's motion.

5 **II. BACKGROUND**

6 This action arises out of a fire that occurred on May 31, 2004, that damaged the  
 7 Blue and Red Trains of the Seattle Monorail as the Blue Train was leaving the Seattle  
 8 Center Station. (See Not. of Rem. (Dkt. # 1) at 7-11 (Compl. ¶¶ 1.1, 3.2).) Plaintiff  
 9 Affiliated FM Insurance Company ("AFM") paid its insured, Seattle Monorail System  
 10 ("SMS"), \$3,267,861.00 for damages resulting from the fire. (*Id.* ¶ 5.1.) AFM, as the  
 11 equitable and contractual subrogee of SMS, brings this action against LTK, which  
 12 provided certain engineer services related to the Monorail, to recover damages associated  
 13 with the May 31, 2004, fire. (*Id.*) In its complaint, AFM alleges:

14 In 2001, the City of Seattle contracted with . . . LTK . . . to refurbish the  
 15 [SMS]. As part of this refurbishment, LTK . . . recommended that the  
 16 grounding system for the Blue and Red Trains that made up the [SMS]  
 17 be changed. This change to the grounding system for the Blue and Red  
 18 Trains was completed in 2002.

19  
 20 \_\_\_\_\_  
 21 <sup>1</sup> Counsel for both LTK and AFM were offered the opportunity to provide the court with  
 22 oral argument concerning this motion on April 15, 2014. Both sides informed the court that they  
 waived the opportunity with respect to this motion.

1 grounding system for the Blue Train had not been changed at the direction of LTK . . . in  
2 2002.” (*Id.* ¶ 3.3.)

3 AFM provides evidence that the original 1961 design of the Monorail employed a  
4 “floating” grounding system, which is a system in which the ground is not actually  
5 connected to the earth or another circuit ground. (5/21/12 Way Decl. (Dkt. # 95) ¶¶ 3, 6.)  
6 Because car bodies of the Monorail were “floating” or electrically isolated, the metal car  
7 bodies did not carry current. (*Id.* ¶ 6.)

8 During the course of discovery in this action, AFM responded to a contention  
9 interrogatory from LTK by indicating that the City of Seattle had contracted with LTK in  
10 1997 to provide engineering services related to the SMS. (*See* 3/30/12 Wahtola Decl.  
11 (Dkt. # 52, 62) ¶ 25, Ex. 5 (attaching AFM’s Ans. to Int. No. 4).) In addition, despite the  
12 allegations in its complaint that LTK recommended changing the Monorail’s grounding  
13 system in 2002, AFM stated in its discovery response and elsewhere that it was during  
14 the course of this earlier project in 1997 or 1998 that LTK initially redesigned the  
15 Monorail’s grounding system from a floating to a “body ground to negative rail”  
16 grounding system, also known as a “grounded” or “bonded” grounding system. (*See id.*  
17 ¶ 25, Ex. 5; 5/21/12 Way Decl. ¶ 7(c).)

18 Part of the evidence at issue arises out of the 2005 insurance coverage suit  
19 between AFM and SMS. The insurance coverage lawsuit arose out of a dispute over  
20 certain costs SMS claimed were related to the fire and covered by its insurance through  
21 AFM. (*See id.* ¶ 18.) During the course of the coverage suit, counsel for AFM deposed  
22

1 the manager of operations and maintenance for SMS, Mr. Glenn Barney.<sup>2</sup> (See *id.* ¶¶ 39-  
 2 42.) In response to direct questioning from AFM's counsel, Mr. Barney testified that  
 3 LTK did not recommend changing the electrical grounding system during 2002, but  
 4 rather recommended "keeping the ground bond between the car body and the negative  
 5 rail." (*Id.* Ex. 12 (attaching 12/8/05 Barney Dep. at 137:24-138:22).) In other words, in  
 6 2002, LTK recommended maintaining the bonded grounding system that LTK had  
 7 apparently redesigned from a floating system to a bonded system in 1998.

8 LTK points out that AFM filed the present complaint within approximately one  
 9 year of Mr. Barney's deposition in the insurance coverage lawsuit. (Mot. at 3.) LTK  
 10 emphasizes that the sole basis for AFM's claim against LTK is the allegation that LTK  
 11 recommended changing the grounding system for the Blue Train pursuant to LTK's 2001  
 12 contract to refurbish the Monorail and that the fire would not have occurred if LTK's  
 13 recommended "change" to the grounding system had not been implemented in 2002. (*Id.*  
 14 (citing Compl. ¶¶ 3.1, 3.3, 4.2).) LTK complains that the allegations in the complaint are  
 15 contrary to the testimony of Mr. Barney in both the underlying insurance coverage  
 16 lawsuit referenced above and more recently in the present lawsuit that LTK did not  
 17 recommend a change in the Monorail's grounding system in 2002. (Mot. at 3-4 (citing  
 18 4/20/12 Wahtola Decl. (Dkt. # 76) Ex. 1 (attaching 4/10/12 Barney Dep. at 59:19-60:25;  
 19 196:1-197:3 (explaining that the Monorail's grounding system could not have been

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20  
 21 <sup>2</sup> In September 1998, Mr. Barney was hired to serve as the maintenance manager for  
 22 SMS and he held that position until 2001 when he became the general manager responsible for  
 overseeing the operations and maintenance of the Monorail. (3/30/12 Wahtola Decl. Ex. 12  
 (attaching 12/8/05 Barney Dep. at 14:8-15:5).)

1 changed in 2002 from a floating to a bonded system based on LTK's recommendation  
 2 because it was already bonded at that time)).)

3       In late 1998 or early 1999, Mr. Barney became aware that members of the SMS  
 4 maintenance staff were experiencing electrical shocks while working on the Monorail  
 5 and there had been instances of electrical "arcing" occurring between the vehicle car  
 6 body and the station. (*Id.* at 80:6-82:25; 126:9-127:11.) As a result of these events, Mr.  
 7 Barney began investigating why the shocks and electrical arcing were occurring. (*Id.*)  
 8 As a result of the investigation, Mr. Barney learned as early as March 2000 that the  
 9 electrical grounding system for the Monorail was "grounded" or "bonded" rather than  
 10 "floating." (*Id.*)

11       SMS was required to "maintain" and "repair" the Monorail pursuant to its  
 12 Concession Agreement with the City of Seattle. (*See id.* at 40:15-41:18, 92:19-93:5.) On  
 13 October 6, 2000, LTK issued a proposal to the City of Seattle to provide services in  
 14 connection with a Monorail renovation project that included a survey of the Monorail  
 15 vehicles to document the existing grounding system. (*Id.* at 49:10-51:11.) SMS was to  
 16 provide the funds to pay for LTK's services. (*Id.* at 47:22-51:11.) The City accepted  
 17 LTK's proposal. (*See* 5/1/12 Wahtola Decl. Ex. 3.) Mr. Barney, however, voiced  
 18 concerns about whether the work LTK proposed to perform was appropriate to correct  
 19 the problems previously identified by SMS relating to the electrical grounding systems.  
 20 (4/20/12 Wahtola Decl. Ex. 1 (attaching 4/10/12 Barney Dep. at 52:7-54:7.))

21       On June 29, 2001, the Blue Train lost power after experiencing an incident of  
 22 electrical "arcing." (*Id.* at 91:4-93:5.) In addition, the Blue Train suffered property

1 damage in the form a one-inch by three-inch hole that was burned through the body of the  
2 car. (*Id.* at 90:21-91:10; 91:24-92:9.) Shortly following the June 29, 2001, incident, Mr.  
3 Barney wrote an incident investigation report. (*Id.* at 90:7-91:19.) In his report, Mr.  
4 Barney identified, as a contributing factor to the incident, the fact that the electrical  
5 grounding system of the SMS had been altered at some point in the past from a floating  
6 to a bonded system. (*See id.* at 93:6-25.)

7 On August 31, 2001, LTK issued a draft copy of its “Grounding and High Voltage  
8 Auxiliary Survey” to Mr. Barney. (4/20/12 Wahtola Decl. Ex. 1 (attaching 4/10/12  
9 Barney Dep. at 94:8 – 95:19).) In the survey, LTK specifically states that it is not  
10 recommending that the existing bonded grounding system be returned to the original  
11 floating design. (*See* 5/1/12 Wahtola Decl. Ex. 8 at 3 (“We are not recommending the re-  
12 installation of the original grounding system.”).) AFM asserts that LTK documented the  
13 1997 change in the Monorail’s grounding system in this survey without expressly  
14 acknowledging LTK’s role in the 1997 design change. (*See* 3/30/12 Wahtola Decl. ¶ 25,  
15 Ex. 5.) Instead, LTK recommended replacing the multiple points of connection in which  
16 the Monorail car bodies were bonded to the high voltage negative return systems with a  
17 “single point of contact.” (5/1/12 Wahtola Decl. Ex. 8 at 3; *see id.* Ex. 10.) LTK re-  
18 routed all of the grounding connections on the Monorail, and reorganized the grounding  
19 system, so that all of the grounded connections were run through a newly designed  
20 terminal board. (Way Decl. (Dkt. # 95) ¶ 10.) This reorganization retained the bonded  
21 grounding system, which LTK redesigned from its original configuration in 1998. (*Id.*)  
22 Thus, although LTK apparently reorganized the grounding system in 2001, the

1 Monorail's grounding system started out as "bonded" or "grounded" prior to LTK's 2001  
2 recommendations and remained so after LTK's recommendations were implemented.  
3 (4/20/12 Wahtola Decl. Ex. 1 (attaching 4/10/12 Barney Dep. at 196:1-197:3 ("[I]t was  
4 grounded starting the project and it was grounded at the end of the project.").)

5 On March 10, 2002, Mr. Barney issued a letter to the City of Seattle objecting to  
6 the work performed by LTK relating to the electrical grounding system. (*Id.* at 109:22-  
7 112:13); 5/1/12 Wahtola Decl. Ex. 12.) In this letter, Mr. Barney refused to reimburse  
8 the City of Seattle for LTK's services relating to the design of the electrical grounding  
9 system on the basis that SMS deemed such services to be "unacceptable." (5/1/12  
10 Wahtola Decl. Ex. 12.) Specifically, SMS objected to the fact that LTK failed to  
11 "incorporate recommended changes to the [grounding] system." (*Id.*)

12 On June 25, 2002, Mr. Barney wrote a letter to Ms. Stephanie Van Dyke of the  
13 City of Seattle. (*Id.* Ex. 17.) In this letter, Mr. Barney stated that he did not believe that  
14 LTK's services with respect to the Monorail's grounding system were performed  
15 adequately. (4/20/12 Wahtola Decl. Ex. 1 (attaching 4/10/12 Barney Dep. at 140:25 –  
16 141:23).) In particular, Mr. Barney explained that he did not believe that the bonded  
17 grounding system as designed by LTK would prevent electrical "arcing" from burning  
18 holes in the Monorail's car bodies or prevent electrical shocks to passengers or SMS  
19 technicians. (*See id.* at 141:24-142:25; *see also* 5/1/12 Wahtola Decl. Ex. 17.) He also  
20 stated that he believed that LTK had "misrepresented" what its design for the Monorail  
21 grounding system would accomplish. (5/1/12 Wahtola Decl. Ex. 17 ("While LTK may  
22 have performed the specific requirements of the Task Force for this project, it should be

1 noted for the future that LTK has fallen far short of meeting expectations that were  
2 clearly presented by SMS, and misrepresented what it would achieve throughout the  
3 course of the project.”).)

4 On July 15, 2002, Mr. Barney, representing SMS, attended a meeting convened by  
5 the City of Seattle for the specific purpose of discussing the Monorail’s grounding system  
6 as designed by LTK. (4/20/12 Wahtola Decl. Ex. 1 (attaching 4/10/12 Barney Dep. at  
7 146:13-147:15).) At this meeting, Mr. Barney, on behalf of SMS, advocated for a  
8 floating grounding system, while representatives of LTK and another electrical  
9 engineering firm argued that the grounded or bonded system LTK had designed for the  
10 Monorail should remain. (*Id.* at 147:5-149:17; 152:22-153:4.) As a result of the meeting,  
11 the City of Seattle determined that the bonded grounding system designed by LTK would  
12 remain in place. (*See id.* at 156:18-157:16; 151:23-25.)

13 After the meeting on the same day, Mr. Barney issued a memorandum to the City  
14 of Seattle, entitled “Notice of Agreement Termination,” in which he stated that he was  
15 terminating SMS’s agreement to reimburse the City of Seattle for LTK’s services. (*See*  
16 5/1/12 Wahtola Decl. Ex. 27; 4/20/12 Wahtola Decl. Ex. 1 (attaching 4/10/12 Barney  
17 Dep.) at 160:19-163:3).) Mr. Barney did not believe that SMS should be obligated to pay  
18 for services that it deemed unacceptable. (*Id.*) He also believed that he should not have  
19 to pay for LTK’s services because the grounding system it recommended posed a safety  
20 hazard to passengers and maintenance staff and would result in additional instances of  
21 electrical arcing causing property damage to vehicles. (*Id.*)

22

1 Despite Mr. Barney's July 15, 2002, "Notice of Agreement Termination" letter to  
 2 the City of Seattle, SMS eventually reimbursed the City of Seattle for the work  
 3 performed by LTK. (See 2/13/14 Wahtola Decl. (Dkt. # 173) Ex. 53 (attaching letter  
 4 from Mr. Barney stating that "SMS is forwarding . . . final payment . . . based on  
 5 recognition that all work on this project . . . has now been completed.").) SMS ultimately  
 6 reimbursed the City of Seattle for LTK's work despite SMS's belief that LTK performed  
 7 its services improperly and that the grounding system would continue to result in fire  
 8 damage and burning of Monorail vehicles by electrical arcing. (4/20/12 Wahtola Decl.  
 9 Ex. 1 (attaching 4/10/12 Barney Dep. at 195:6-197:3); 5/1/12 Wahtola Decl. Ex. 28.)

10 LTK contends, based on the facts recited above, that it is entitle to summary  
 11 judgment on three grounds: (1) that the facts alleged in the complaint are false (Mot. at  
 12 14-19), (2) that AFM's claims are barred by the statute of limitations (*id.* at 19-21), and  
 13 (3) that SMS failed to mitigate its damages and assumed the risks relating to the Monorail  
 14 grounding system (*id.* at 21-24). The court addressed each argument in turn.

### 15 III. ANALYSIS

#### 16 A. Standards on Summary Judgment

17 Federal Rule of Civil Procedure 56 permits a court to grant summary judgment  
 18 where the moving party demonstrates (1) the absence of a genuine issue of material fact  
 19 and (2) entitlement to judgment as a matter of law. *See Fed. R. Civ. P. 56; Celotex Corp.*  
 20 *v. Catrett*, 477 U.S. 317, 322 (1986); *see also Galen v. Cnty. of L.A.*, 477 F.3d 652, 658  
 21 (9th Cir. 2007). The moving party bears the initial burden of production of showing an  
 22 absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the moving

1 party does not bear the ultimate burden of persuasion at trial, it can show an absence of  
 2 issue of material fact in two ways: (1) by producing evidence negating an essential  
 3 element of the nonmoving party's case, or, (2) showing that the nonmoving party lacks  
 4 evidence of an essential element of its claim or defense. *Nissan Fire & Marine Ins. Co.,*  
 5 *Ltd., v. Fritz Cos., Inc.*, 210 F.3d 1099, 1106 (9th Cir. 2000).

6 If the moving party meets its burden of production, the burden shifts to the non-  
 7 moving party to designate specific facts demonstrating the existence of genuine issues for  
 8 trial. *Celotex*, 477 U.S. at 324. The "mere existence of a scintilla of evidence in support  
 9 of the plaintiff's position will be insufficient; there must be evidence on which the jury  
 10 could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
 11 252 (1986). In determining whether the factfinder could reasonably find in the non-  
 12 moving party's favor, "the court must draw all reasonable inferences in favor of the  
 13 nonmoving party, and it may not make credibility determinations or weigh the evidence."  
 14 *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133, 150 (2000).

15 **B. Adequacy of the Factual Allegations**

16 LTK's first argument for summary judgment is one that is familiar to the court.  
 17 The gravamen of LTK's argument can be summarized as follows: AFM alleged in its  
 18 complaint that LTK negligently recommended changing the grounding system for the  
 19 Monorail during the 2001/2002 timeframe (Compl. ¶¶ 3.1, 3.3, 4.2). The evidence  
 20 produced during discovery, however, demonstrates that this allegation is incorrect.  
 21 During discovery, the evidence revealed that (1) LTK initially changed in the Monorail's  
 22 grounding system from a "floating" to a "bonded" or "grounded" system in the

1 1997/1998 timeframe, and (2) when asked to reevaluate the grounding system in the  
2 2001/2002 timeframe, LTK recommended maintaining and reconfiguring the already  
3 “bonded” grounded system, but declined to recommend changing it back to a “floating”  
4 design. Thus, LTK asserts that because it did not recommend changing the fundamental  
5 design of the grounding system in the 2001/2002 timeframe, the allegations contained in  
6 AFM’s complaint are false, and LTK is entitled to summary judgment. (See Mot. at 14-  
7 19.)

8 This is the fourth time that LTK has advanced this argument to the court. The  
9 court rejected the argument the first two times that LTK raised it in the context of  
10 discovery motions. (See 5/1/12 Order (Dkt. # 82) at 9-10; 5/25/12 Order (Dkt. # 96) at 9-  
11 10.) LTK raised the argument a third time in a previous motion for summary judgment.  
12 (2d SJ Mot. (Dkt. # 80) at 17-21.) The court opted not to rule on the issue in the context  
13 of LTK’s previous summary judgment motion because the court disposed of the motion  
14 on other grounds. (6/14/12 Order (Dkt. # 103) at 9-10.) Now, LTK has raised the issue  
15 for a fourth time in its present motion for summary judgment. To quote Yogi Berra:  
16 “It’s like *déjà vu* all over again.” This time, however, the court reaches the issue on  
17 summary judgment, and its twice-stated previous conclusion that the argument is not well  
18 stated endures.

19 LTK relies primarily on *Cline v. Industrial Maintenance Engineering &*  
20 *Contracting Co.*, 200 F.3d 1223 (9th Cir. 2000). *Cline*, however, is easily  
21 distinguishable. *Cline* involved a purported class action lawsuit in which the critical  
22 issue was whether the subject employee benefit plan qualified as an individual retirement

1 account (“IRA”) plan under the Employee Retirement Income Security Act (“ERISA”),  
2 29 U.S.C. § 1001, *et seq.* *See Cline*, 200 F.3d at 1231. Plaintiffs alleged in their initial  
3 complaint, which was dismissed, that the plan was IRA qualified. *Id.* at 1228. Plaintiffs  
4 subsequently filed an amended complaint in which they alleged that the plan was not IRA  
5 qualified. *Id.* In affirming summary judgment, the *Cline* court stated that “[plaintiffs]  
6 could not contradict their earlier allegations in an effort to survive summary judgment.”  
7 *Id.* at 1232.

8 Unlike the plaintiffs in *Cline*, AFM has not contradicted the allegations in its  
9 complaint. It has alleged that the LTK recommended a change to the grounding system  
10 for the Blue and Red Trains. (Compl. ¶ 3.1.) It has also alleged that “[t]he electrical  
11 ground fault responsible for the fire in the Blue Train on May 31, 2004[,] would have  
12 been avoided if the electrical grounding system for the Blue Train had not been changed  
13 at the direction of LTK . . . .” (*Id.* ¶ 3.3.) As both AFM and this court has previously  
14 noted, the Ninth Circuit has characterized the salient allegations in AFM’s complaint as  
15 “alleg[ing] that the fire [on the Monorail] was a result of LTK’s negligent design.”  
16 *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 556 F.3d 920, 920 (9th Cir. 2009).  
17 The Washington Supreme Court characterized the gravamen of AFM’s complaint as  
18 “claiming that LTK was negligent in changing the electrical ground system for the Blue  
19 and Red Trains.” *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 243 P.3d 521, 524  
20 (Wash. 2010). Unlike the plaintiffs in *Cline*, AFM has not abandoned this fundamental  
21 allegation concerning LTK’s negligence nor contradicted it.

1 The present dispute is not about the gravamen of AFM's claims concerning LTK's  
 2 alleged negligence. Rather, it is all about timing. In its complaint, AFM alleges that  
 3 LTK's negligence in recommending a change in the grounding system for the Red and  
 4 Blue Trains occurred in 2001 or 2002. (See Compl. ¶¶ 3.3, 4.2.) However, in its  
 5 December 7, 2011, responses to LTK's interrogatories, AFM stated that during 1997  
 6 "LTK approved the modification of the train grounding scheme from a 'floating body'  
 7 design to a 'body grounded to negative rail' design," and this change "represented a  
 8 fundamental change in the grounding system that affected its function, maintenance and  
 9 operating procedures, and safety for both staff and passengers." (3/30/12 Wahtola Decl.  
 10 Ex. 5 at 2-4.) AFM's experts have now asserted that LTK was negligent because (1)  
 11 LTK changed the Monorail's "floating" grounding system to a "grounded" grounding  
 12 system in 1997 or 1998,<sup>3</sup> and (2) LTK declined to recommend changing the grounding  
 13 system back to a floating design when it was engaged by the City once again in the  
 14 2000/2001 timeframe to survey the Monorail's electrical systems. (See AFM Expert  
 15 Discl. (Dkt. # 58) Ex. 2.) Thus, during discovery AFM refined its theory of LTK's  
 16 negligence to acknowledge that (1) LTK apparently initiated the original design change  
 17 in the Monorail's grounding system in 1997/1998 rather than in 2001/2002, and (2) in  
 18 2001/2002 LTK refused to recommend changing the grounding system back to a  
 19 "floating" design despite Mr. Barney's apparent urging at the time. Although AFM's

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20  
 21 <sup>3</sup> This avenue of liability is foreclosed by the Ninth Circuit's May 22, 2013, decision.  
 22 (9th Cir. Mem. Disp. (Dkt. # 137) at 3 ("To the extent Plaintiff claims that the fire was caused by  
 LTK's alleged negligence in changing from a floating to a bonded grounding system in 1998, the  
 district court correctly concluded that Plaintiff's claim is time-barred.").)

1 allegations have been refined through discovery, AFM has not fundamentally abandoned  
2 nor contradicted its essential claim that LTK was negligent with respect to its  
3 recommendations concerning the Monorail's grounding system. Thus, *Cline* is simply  
4 not applicable here.

5 In any event, LTK's argument is inconsistent with modern pleading practice.  
6 Prior to the modern era of notice pleading, "pleading requirements were strict and  
7 variances of proof were not generally tolerated." *See Health Care & Retirement Corp. of*  
8 *Am. v. St. Paul & Marine Ins. Co.*, 621 F. Supp. 155, 162 (S.D. W.Va. 1985). A  
9 complaint under modern rules, however, is required only to put the defendant on notice of  
10 a claim showing that the pleader is entitled to relief or to have "facial plausibility." Fed.  
11 R. Civ. P. 8; *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009). AFM's complaint meets this  
12 standard. Nevertheless, there is no doubt that under modern pleading rules a fact alleged  
13 in a complaint "may be a poor measure of what is to follow." *Health Care*, 621 F. Supp.  
14 at 162. The gravamen of AFM's complaint is that LTK was negligent with regard to its  
15 work on the Monorail's grounding system. (*See generally* Compl.) The fact that the  
16 dates in AFM's complaint are off or that AFM's description of LTK's negligence has  
17 been refined through discovery does not render AFM's present position to be an  
18 irredeemable contravention of its prior allegations. This is the very type of refinement to  
19 the parties' positions, whether claims or defenses, that one anticipates will occur during  
20 discovery, particularly in light of our modern pleading rules.

21 Even prior to the modern era of notice pleading, however, courts did not consider  
22 even large discrepancies in dates or timing to be fatal variances between pleading and

1 proof. *See, e.g., United States v. Le Baron*, 71 U.S. 642, 648 (1866) (stating that  
 2 allegations of time need not be proven with precision, but that a very large departure  
 3 therefrom is allowable); *Hollweg v. Schaffer Brokerage Co.*, 197 F. 689, 694-95 (6th Cir.  
 4 1912) (holding that in an action for breach of employment contract alleged to have been  
 5 made in February and modified in October, there was no fatal variance, although the  
 6 proof was of a contract made in April and modified in November). If courts permitted  
 7 large departures in the timing prior to the era of modern pleading, then certainly such  
 8 departures generally should be of no moment today.

9       Most importantly, LTK has asserted no prejudice with respect to any discrepancies  
 10 concerning timing or dates in AFM's complaint (*see generally* Mot. at 14-19), nor can it.  
 11 LTK has been aware of AFM's refined theory of liability since at least December 2011,  
 12 when AFM responded to LTK's interrogatories. (*See* 3/30/12 Wahtola Decl. ¶ 22, 25-26,  
 13 Exs. 3, 5.) Thus, LTK has had ample opportunity to prepare with respect to AFM's  
 14 claims, including a period of time when discovery was reopened following remand from  
 15 the Ninth Circuit Court of Appeals. (*See* Dkt. ## 150, 153, 167.)

16       Finally, in response to LTK's motion, AFM presents an August 25, 2001, draft  
 17 report, prepared by LTK's engineers, which provides some evidence that LTK did  
 18 recommend a change in the Monorail's grounding system in the 2001/2002 timeframe.  
 19 The draft report states, in part:

20       It is not entirely clear what the original intent was for the grounding system,  
 21 but the current system is close to industry standard for vehicle grounding  
 22 systems. There is a safety ground system which connects electrical  
 equipment to the vehicle frame . . . . The high voltage and low voltage  
 negative returns are floating, except for an intentional jumper between the

1 safety ground and the high voltage negative return . . . . This system should  
 2 be improved on by replacing the present wire labeling; removing any  
 3 unintended connections between safety ground, low voltage negative  
 4 return, and high voltage negative return; and installing missing cables,  
 5 particularly on the blue train. The original low voltage negative returns  
 6 were labeled "LG" for low ground, and the high voltage negative returns  
 7 were labeled "HG" for high ground. The LG cables were tied to the frame  
 8 of the vehicle at many points. When the low voltage system was replaced,  
 much of the LG wiring was left in place, and is now acting as the safety  
 ground, bonding equipment to the frame of the vehicle. These cables  
 should now be relabeled "SG" for safety ground. The high voltage negative  
 return should be relabeled "HV-", [sic] and the low voltage negative return  
 should be relabeled "LV-" [sic]. The safety ground, low voltage negative  
 return, and the high voltage negative return should be bonded together at  
 one location at the high voltage auxiliary panel.

9 (Pierson Decl. (Dkt. # 189) ¶ 3, Ex. A at ¶ 2.1).) AFM is correct that this evidence is  
 10 sufficient to raise an issue of fact concerning whether LTK recommended a change to the  
 11 Monorail's grounding system in 2001/2002 timeframe (see Resp. at 12-13) as alleged in  
 12 AFM's complaint (see Compl. ¶¶ 3.1, 3.3, 4.2).<sup>4</sup> This is so even though the final report

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14 <sup>4</sup> LTK responds to the draft report by asserting that AFM fails to lay a proper foundation  
 15 for it, and it is therefore not competent evidence that the court can consider on summary  
 16 judgment. (Reply (Dkt. # 192) at 6-7.) In order to properly support or oppose summary  
 17 judgment, the party relying on the affidavits and records must lay a proper foundation. *See*  
*Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1182 (9th Cir. 1988). "[W]hether the  
 18 authentication requirement should be applied to bar evidence when its authenticity is not actually  
 19 disputed, however, is questionable." *Burch v. Regents of Univ. of Cal.*, 433 F. Supp. 2d 1110,  
 1120 (E.D. Cal. 2006). The document submitted by AFM was produced in discovery by LTK.  
 (See Pierson Decl. Ex. A (denoting LTK production numbers at the bottom of each page of the  
 20 draft report).) AFM has proffered that it is a draft report created by LTK's engineers in 2001.  
 (Id. ¶ 3; Resp. at 13.) LTK does not deny these facts in its reply memorandum, but objects only  
 21 on grounds that AFM's counsel did not lay a proper foundation for the draft report in his  
 22 declaration. (Reply at 6 (citing *Cal. Pac. Bank v. Small Business Admin.*, 557 F.2d 218, 222 (9th  
 Cir. 1977); *United States v. Dibble*, 429 F.2d 598, 602 (9th Cir. 1970))). The Ninth Circuit has  
 emphasized that "[a]t the summary judgment stage, we do not focus on the admissibility of the  
 evidence's form[, but rather] on the admissibility of its contents." *Fraser v. Goodale*, 342 F.3d  
 1032, 1036 (9th Cir. 2003). Further, "courts generally are much more lenient with the affidavits  
 of a party opposing a summary judgment motion." *Scharf v. United States Att'y General*, 597

1 indicated that the Monorail grounding system was “grounded” or “bonded” in 2001. (See  
 2 Reply at 6-9, n.3 (citing 3/30/12 Wahtola Decl. Ex. 1 (attaching Collins Dep. at 87:21-  
 3 97:21).) The fact that the final report may contain different or contrary conclusions from  
 4 the draft report does not abnegate the issue of fact created thereby. For all of the  
 5 foregoing reasons, the court denies LTK’s motion for summary judgment on grounds that  
 6 AFM’s evidence does not conform to the factual allegations in its complaint.

7 **C. Statute of Limitations**

8 LTK’s second ground for summary judgment is also a variation on LTK’s prior  
 9 argument that AFM’s claim is barred by the statute of limitations. (*Compare* Mot. at 19-  
 10 21 *with* 5/1/12 SJ Mot. (Dkt. # 80) at 21-24.) On June 14, 2012, the court granted LTK’s  
 11 motion for summary judgment with respect to the statute of limitations. (*See generally*  
 12 6/14/12 Order (Dkt. # 102).) The court found that Mr. Barney knew all the salient facts  
 13 necessary for SMS to assert a claim against LTK based on LTK’s alleged negligent  
 14 redesign of the Monorail by at least July 15, 2002. (*Id.* at 13.) Specifically, the court

15 \_\_\_\_\_  
 16 F.2d 1240, 1243 (9th Cir. 1979). Because the report at issue was apparently drafted by LTK, a  
 17 party to this suit, it is susceptible to authentication and admission at trial. *See id.* (evidence  
 18 which could be made admissible at trial may be considered on summary judgment); *see also*  
*Aholelei v. Hawaii Dep’t of Public Safety*, 220 Fed. App’x 670, 672 (9th Cir. 2007); *Anselmo v.*  
*Mull*, No. 2:12-01422 WBS EFB, 2013 WL 5817560, at \*4 (E.D. Cal. Oct. 29, 2013) (“Even if  
 19 the non-moving party’s evidence is presented in a form that is currently inadmissible, such  
 20 evidence may be evaluated on a motion for summary judgment so long as the moving party’s  
 21 objections could be cured at trial.”). Because LTK is the source of the draft report, if there were  
 22 a valid basis for contesting its authenticity, LTK could and presumably would have unearthed it  
 and presented it to the court. LTK has not done so. *See Fenje v. Feld*, 301 F. Supp.2d 781, 789  
 (N.D. Ill. 2003) (“Even if a party fails to authenticate a document properly or to lay a proper  
 foundation, the opposing party is not acting in good faith in raising such an objection if the party  
 nevertheless knows that the document is authentic.”). Accordingly, the court considers the draft  
 report with respect to LTK’s motion for summary judgment.

1 found that Mr. Barney knew that SMS technicians and Monorail passengers were  
2 receiving electrical shocks and electrical arcing was burning holes thought the bodies of  
3 Monorail cars. (*Id.*) The court concluded that, because SMS knew that it had been  
4 injured as a result of LTK's alleged negligent redesign of the Monorail's grounding  
5 system as of the above date, the statute of limitations on the cause of action against LTK  
6 began to run on that date. (*Id* at 17.) Because AFM, as SMS's subrogee, had not filed  
7 suit until more than three years after July 15, 2002, the court ruled that AFM's action was  
8 time barred. (*Id.*)

9 The Ninth Circuit reversed. The Ninth Circuit held that “[t]o the extent that  
10 [AFM] claims that the fire was caused by LTK's alleged negligence in changing from a  
11 floating to a bonded grounding system in 1998, the district court correctly concluded that  
12 [AFM's] claim is time-barred.” (9th Cir. Mem. Disp. at 3.) The Ninth Circuit noted,  
13 however, that AFM's theory, at least in part, was that negligence occurred in the design  
14 and installation of the terminal board in 2001 and 2002 and that the redesign of the  
15 terminal board was the proximate cause of the 2004 fire. (*Id.*) LTK argued that at least  
16 one of the series of electrical events referenced above occurred after the terminal board  
17 installation and was sufficient to start to the limitations period running. (*Id.*) However,  
18 the Ninth Circuit held:

19 The record is unclear about the extent, significance, and cause of the  
20 alleged of the alleged post-installation incidents and, indeed, whether they  
21 actually occurred post-installation. Conflicting inferences may be drawn  
22 from the monorail manager's correspondence and testimony about the  
events. . . . Given the disputed facts, and drawing inferences in favor of  
[AFM], we conclude that genuine issues of material fact exist precluding  
summary judgment.

1 (Id. at 4.)

2        This time around, following remand from the Ninth Circuit, LTK argues that the  
 3 statute of limitations began to run on October 30, 2002, when SMS paid thousands of  
 4 dollars to reimburse the City of Seattle for LTK's electrical engineering services related  
 5 to the Monorail grounding system that SMS deemed to have been improperly and  
 6 negligently performed. (Mot. at 20.) LTK argues that "this payment constitutes actual  
 7 and appreciable harm on the part of SMS thereby resolving the only question of fact  
 8 identified by the Ninth Circuit in its Memorandum." (Id. at 20-21.) Because AFM did  
 9 not file suit until more than three years after October 30, 2002, LTK once again asserts  
 10 that AFM's suit is barred by the statute of limitations.<sup>5</sup> (See *id.* at 21.)

11        In Washington, the discovery rule states that the statute of limitations starts to run  
 12 on a negligence claim when the plaintiff discovers, or in the exercise of reasonable  
 13 diligence should have discovered, facts giving rise to the cause of action. *See Hipple v.*  
 14 *McFadden*, 255 P.3d 730, 735 (Wash. Ct. App. 2011) (citing *Peters v. Simmons*, 552  
 15 P.2d 1053, 1056 (Wash. 1976)); *1000 Va. Ltd. P'ship*, 146 P.3d at 428 (stating that under  
 16 the "discovery rule of accrual, . . . a cause of action accrues when the plaintiff discovers,  
 17 or in the reasonable exercise of diligence should discover, the elements of a cause of  
 18 action."). LTK fundamentally misapprehends that nature of the harm that SMS must

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 21       <sup>5</sup> In Washington, a three-year statute of limitations governs claims of negligence. *See*  
 22 *Wash. v. Boeing Co.*, 19 P.3d 1041, 1050 (Wash. Ct. App. 2000) (stating that negligence claims  
 are subject to the three-year limitations period in RCW 4.16.080). "Statutes of limitations do not  
 begin to run until a cause of action accrues." *1000 Va. Ltd. P'ship*, 146 P.3d at 428 (citing RCW  
 4.16.005.).

1 have discovered in order to initiate the running of the limitations period. In the context of  
2 this case, the Washington Supreme Court has stated that “[a]n injury is remediable in tort  
3 if it traces back to the breach of a tort duty arising independently of the terms of the  
4 contract.” *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 243 P.3d 521, 526  
5 (Wash. 2010) (quoting *Eastwood v. Horse Harbor Found.*, 241 P.3d 1256, 1262 (Wash.  
6 2010)). Payment of the contract price to the City of Seattle did not put SMS on notice of  
7 its cause of action in negligence against LTK in such a manner as to start the limitations  
8 period running. Although, as LTK argues, this expenditure may count as part of AFM’s  
9 alleged damages, the simple act of paying LTK’s contract price would not lead Mr.  
10 Barney to discover SMS’s negligence claim against LTK so as to initiate the limitations  
11 period.

12 Instead, it was SMS’s alleged continuing problems with the electrical and/or  
13 grounding systems of the Monorail about which Mr. Barney complains at length in the  
14 course of his July 15, 2002, letter that arguably placed SMS on notice of its claim. (See  
15 Wahtola Decl. (Dkt. # 173) Ex. A at 100.) Those issues included “mild electrical shocks  
16 to staff and passengers, and electrical arcing and burning of the train car bodies.” (*Id.*)  
17 The Ninth Circuit, however, has already ruled that “[t]he record is unclear about the  
18 extent, significance, and cause of the alleged post-[terminal board]-installation incidents  
19 and, indeed whether they actually occurred post-installation.” (9th Cir. Mem. Disp. at 4.)  
20 Because the Ninth Circuit has concluded that “[c]onflicting inferences may be drawn  
21 from the monorail manager’s correspondence and testimony about the events” (*id.*), the  
22 court must deny LTK’s second motion for summary judgment based on expiration of the

1 statute of limitations. At its core, LTK's second motion for summary judgment based on  
 2 the statute of limitations is nothing more than a poor rehash of its first motion. The Ninth  
 3 Circuit has firmly rejected the notion that this issue can be resolved on summary  
 4 judgment. (*See id.*) Thus, LTK's statute of limitations defense remains an issue for the  
 5 jury to decide at trial.

6 **D. Mitigation of Damages and Assumption of Risk**

7 LTK asserts that it is entitled to summary judgment because SMS failed to  
 8 mitigate its damages and assumed the risk of the Monorail's bonded grounding system.  
 9 (Mot. at 21-24.)

10 The doctrine of mitigation of damages, or avoidable consequences, prevents an  
 11 injured party from recovering damages that the injured party could have avoided if it had  
 12 taken reasonable efforts after the wrong was committed. *Transalta Centralia Generation*  
 13 *LLC v. Sicklesteel Cranes, Inc.*, 142 P.3d 209, 212 (Wash. Ct. App. 2006); *see Young v.*  
 14 *Whidbey Island Bd. of Realtors*, 638 P.2d 1235, 1238 (Wash. 1982). A person who has  
 15 been injured by another's wrongdoing is given wide latitude and is only required to act  
 16 reasonably in mitigating his or her damages. *Hoglund v. Klein*, 298 P.2d 1099, 1102  
 17 (Wash. 1956); *Transalta Centralia*, 142 P.3d at 212. Thus, whether a party properly  
 18 mitigates his or her damages turns on a determination of reasonableness, and an issue  
 19 about which reasonable minds could differ is a question for the jury. *Id.*

20 In Washington, the doctrine of assumption of risk has four facets: (1) express  
 21 assumption of risk, (2) implied primary assumption of risk, (3) implied reasonable  
 22 assumption of risk, and (4) implied unreasonable assumption of risk. *Tincani v. Inland*

1 *Empire Zoological Soc'y*, 875 P.2d 621, 633 (Wash. 1994). The third and fourth aspects  
 2 of assumption of risk are simply alternative names for contributory negligence, *Scott v.*  
 3 *Pacific West Mountain Resort*, 834 P.2d 6, 13 (Wash. 1992), and LTK has placed neither  
 4 at issue in the present motion (*see generally* Mot. at 21-24). Neither has LTK asserted  
 5 that SMS expressly assumed the risk of LTK's work with respect to the Monorail's  
 6 bonded grounding system. (*Id.*) Instead, LTK asserts that it is entitled to summary  
 7 judgment with respect to AFM's claims under implied primary assumption of risk. (Mot.  
 8 at 22 ("Of particular importance to the present case, 'Implied primary assumption of risk  
 9 is a complete bar to recovery. . . .'"') (quoting *Gregoire v. City of Oak Harbor*, 244 P.3d  
 10 924, 928 (Wash. 2010).) Both express and implied assumption of risk raise the same  
 11 question: Did the plaintiff consent, before the accident or injury, to the negation of a duty  
 12 that the defendant would otherwise have owed to the plaintiff? *Home v. N. Kitsap Sch.*  
 13 *Dist.*, 965 P.2d 1112, 1118 (Wash. Ct. App. 1998). If the answer is yes, "the defendant  
 14 does not have a duty, there can be no breach and hence no negligence." *Id.* (quoting  
 15 *Scott*, 834 P.2d at 13).

16 Because implied primary assumption of risk is a complete bar to recovery, courts  
 17 construe the doctrine narrowly. *Lascheid v. City of Kennewick*, 154 P.3d 307, 310  
 18 (Wash. Ct. App. 2008). To invoke the doctrine, LTK must show that SMS "knowingly  
 19 and voluntarily chose to encounter the risk." *Home*, 965 P.2d at 1119. The evidence  
 20 must show that SMS (1) had full subjective understanding (2) of the presence and nature  
 21 of the specific risk, and (3) voluntarily chose to encounter it. *Id.* Whether a plaintiff  
 22 decides knowingly to encounter a risk turns on whether the plaintiff, at the time of

1 decision, actually and subjectively knew all facts that a reasonable person in the  
 2 defendant's shoes would know and disclose, or concomitantly, all facts that a reasonable  
 3 person in the plaintiff's shoes would want to know and consider. *Id.* Knowledge and  
 4 voluntariness are questions of fact for the jury, except when reasonable minds could not  
 5 differ. *Id.*; *Wirtz v. Gillogly*, 216 P.3d 416, 420 (Wash. Ct. App. 2009).

6 LTK argues that despite SMS's stated concerns about LTK's engineering with  
 7 respect to the Monorail's grounding system and continued electrical arcing in the system,  
 8 SMS continued to operate and maintain the Monorail with a bonded grounding system in  
 9 place and even reimbursed the City of Seattle for LTK's work. (See Mot. at 24.) Thus,  
 10 according to LTK, SMS (and therefore also AFM as SMS's subrogee) knew of the  
 11 dangers that were purportedly inherent in LTK's work, but nevertheless assumed those  
 12 risks or failed to mitigate its damages by continuing to operate the system. (*Id.*)

13 Here, however, there is evidence that in the face of SMS's doubts about LTK's  
 14 engineering regarding the Monorail's grounding system, LTK issued assurances of safety  
 15 to SMS. For example in an email August 27, 2002, Mr. Barney stated:

16 . . . [E]lectrical engineers from . . . LTK . . . have confirmed that the existing  
 17 grounding systems, for both the trains and the traction power system, meet  
 all necessary safety requirements.

18 \*\*\*\*\*

19 . . . [E]lectrical engineers from . . . LTK . . . have confirmed that the  
 20 protection devices built into the train grounding system, and the traction  
 21 power supply system, will protect passengers from any injury resulting  
 from electrical shock. We have been assured by these engineers that mild  
 shocks to passengers is normal, and presents no danger.

22 (3/3/14 Pierson Decl. (Dkt. # 189) Ex. E.)

1       These reassurances from LTK regarding the safety of the grounding system in the  
2 face of SMS's doubts raise an issue of fact both with respect to LTK's defense of  
3 mitigation of damages as well as assumption of risk. Whether it was reasonable for SMS  
4 to rely on these assurances of safety from LTK engineers and move forward with  
5 payment to the City of Seattle for LTK's services and continued operation of the  
6 Monorail or whether based on its own apparent substantial doubts SMS should have  
7 refused to pay the City of Seattle for LTK's services or taken other actions to mitigate its  
8 damages is an issue of fact reserved for the jury. Likewise, whether SMS was entitled to  
9 surrender its judgment concerning the danger related to the Monorail's bonded grounding  
10 system based on LTK's assurances of safety, thereby negating any assumption of risk  
11 defense, raises an issue of fact about which reasonable minds could differ. *See, e.g.,*  
12 *Jones v. Baker*, 35 P.2d 1103, 1105 (Wash. 1934) (“Where . . . the master has assured the  
13 servant that the place is safe, or has directed the specific thing to be done in such a  
14 manner as to imply an assurance, the servant will not be held to have assumed the risk.”);  
15 *Fred Harvey Corp. v. Mateas*, 170 F.2d 612, 616 (9th Cir. 1948) (stating that if the  
16 plaintiff surrenders his better judgment upon an assurance of safety or a promise of  
17 protection, he does not assume the risk, unless the danger is so obvious and so extreme  
18 that there can be no reasonable reliance upon the assurance); *Garcia v. Estate of Tom  
19 Norton*, 228 Cal Rptr. 108, 113 (Cal. Ct. App. 1986) (“Where an injured party has  
20 surrendered his better judgment upon an assurance of safety by one who owes him a duty  
21 of care, he does not assume the risk of participating in an activity unless the danger is so  
22

1 obvious and so extreme that there can be no reasonable reliance upon the assurance.”).  
2 Accordingly, the court denies LTK’s motion for summary judgment based on its defenses  
3 of failure to mitigate damages and assumption of risk. These issues remain for the jury at  
4 trial.

5 **IV. CONCLUSION**

6 Based on the foregoing, the court DENIES LTK’s motion for summary judgment  
7 (Dkt. # 172), and this matter will proceed to trial.

8 Dated this 16th day of April, 2014.

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12 JAMES L. ROBART  
United States District Judge  
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